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91-1868

NO. _____

Supreme Court, U.S.
FILED
MAY 5 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

CLAUDE J. BRIDGES,

Petitioner

versus

THE SECRETARY OF THE AIR FORCE,
THE AIR FORCE BOARD FOR CORRECTION
OF MILITARY RECORDS,

Respondents

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Claude J. Bridges, *Pro Se*
2428 Wisconsin N.E.
Albuquerque, NM 87110

QUESTIONS PRESENTED FOR REVIEW

1. Whether the statute of limitations of three years, should have been waived, because of the injustices and the discriminations that were practiced against me while serving in a dual status in the grade of Master Sergeant and at the same time holding a reserve commission in the Officers Reserve Corps?

2. Whether the Board for Correction of Military Records excused the time limit in U.S.C. 1552 (b) by reviewing my application on the merits of the case. Were the Board's actions arbitrary and capricious and not supported by evidence?

3. Whether the District Court erred in granting summary judgment prior to the opportunity to pursue discovery and in light of Rule 56(f) affidavit?

4. Did the Federal District Court for New Mexico and the Court of Appeals tenth Circuit, err in considering only the time limitation and not the injustices practiced against me as a reserve officer on active duty as an enlisted person?

PARTIES TO THE PROCEEDING

1. Petitioner: Claude J. Bridges

2. Respondents:

   a. The Secretary of the Air Force

   b. The Air Force Board for Correction of Military Records (AFBCMR).

OFFICIAL REPORTS OF OPINIONS

1. The opinion of the Air Force Board for Correction of Military Records, petition denied because of untimeliness.

2. The United States District Court for New Mexico, motion to dismiss denied, motion for summary judgment granted.

3. United States Court of Appeals, Tenth Circuit, Affirmed.

TABLE OF CONTENTS

1. Questions Presented for Review . . . . .

2. Parties to the Proceeding . . . . . .

3. Official Reports of Opinions . . . . . .

4. Jurisdictional Statement . . . . . .

5. Statement of the Case . . . . . .

6. Reasons for Granting the Writ . . . . .

Appendix A — Judgment from United States District Court for the District of New Mexico, entered May 9, 1991; and Order and Judgment from United States Court of Appeals, Tenth Circuit, entered February 7, 1992

Appendix B — War Department Circular No. 310, dated October 6, 1945

Appendix C — War Department Circular No. 10, dated January 11, 1946

TABLE OF AUTHORITIES

CASES

Kaiser v. Secretary of the Navy, 525 F.Supp 1226 (D. Colo. 1981) . . . . . .

STATUTES

U.S.C. Section 1552(b) . . . . . .

28 U.S.C. Section 1254 . . . . . .

28 U.S.C. Section 1331 . . . . . .

5 U.S.C. Section 702 . . . . . .

28 U.S.C. Section 1291 . . . . . .

RULES

Supreme Court Rule 10.1 (a) and (c) . .

PETITION FOR WRIT OF CERTIORARI

Petitioner, CLAUDE J. BRIDGES, respectfully prays that a Writ of Certiorari issue to review the ruling of the United States Court of Appeals, Tenth Circuit, denying Petitioner's Complaint to direct the Air Force Board for Correction of Military Records to correct his military records under 10 U.S.C. Section 1552.

JURISDICTIONAL STATEMENT

1. Pursuant to 28 U.S.C. Section 1254 and United States Supreme Court Rule 10.1 (a) and (c) this Court has jurisdiction to consider this Petition for Writ of Certiorari to review the decision of the Court of Appeals, Tenth Circuit. Jurisdiction in the District Court was based on 28 U.S.C. Section 1331 and 5 U.S.C. Section 702. Jurisdiction in the Court of Appeals, Tenth Circuit was based on 28 U.S.C. Section 1291. The Tenth Circuit entered judgment on February 7, 1992.

STATEMENT OF THE CASE

I was commissioned a Second Lieutenant in the Officers Reserve Corps (ORC) 11 November

1945 and relieved from active duty on 8 December 1945. On 14 December 1945, I enlisted under Section V Paragraph (b), War Department Circular 310, dated 6 October 1945, in the Regular Army Air Corps, in the grade of Master Sergeant. My main thoughts at this time was my reserve commission in the ORC. Captain Albert N. Hasson, the Commanding Officer of the Recruiting Station, assured me that I would be serving in a dual status. I was shown a War Department Memo dated 8 November 1945 that stated reserve officers enlisting under Section V Paragraph (b), in the grade of Master Sergeant, are not required to resign their reserve commissions, signed Edward F. Witsell, Major General, the Adjutant General.

I was first recommended for promotion by Colonel Teddy H. Sanford who was the Commanding Officer of the New Mexico West Texas Recruiting District, to the Reserve Promotion Board, Eighth Service Command, Fort Sam Houston, Texas. The promotion board returned the recommendation and

stated the correct authority for the promotion was War Department Circular 10, dated 11 January 1946. They informed Colonel Sanford that at this time they were not promoting reserve officers who had enlisted in the regular service. When Colonel Sanford inquired as to the denial of my promotion he was told that it was command policy to not promote reserve officers who were enlisted in the regular service. War Department Circular 10, made no references to disqualifying a reserve officer from promotion who had enlisted in the regular services.

The second recommendation for my promotion was submitted by Colonel O. I. Holman, who succeeded Colonel Sanford as commander, to the promotion board, Fourth Army, that had succeeded the Eighth Service Command, Fort Sam Houston, Texas. Again, I was denied my reserve promotion to First Lieutenant, by reason of command policy.

I was recommended for promotion for the third time by my commanding officer at Lowry AFB, Denver, Colorado, 7 March 1951. My reserve assignment had been transferred to the Tenth Air Force, Selfridge AFB, Michigan. Again, I was denied a reserve promotion because of my enlisted status.

The Air Force had published new regulations covering the reserve forces. The Air Force regulations did not disallow the promotion of reserve officers who were enlisted in the Regular Air Force. When my promotion was denied by Tenth Air Force, I visited Tenth Air Force at Selfridge AFB, Michigan, and inquired as to why my reserve promotion had been denied. I informed the reserve promotion board that I had contacted 12th Air Force, at Brooks AFB, Texas, and was told that they knew of no regulation that denied promotions of reserve officers who were also enlisted as an Airman in the Regular Air Force. They were promoting Airmen who held reserve commissions when they became eligible

and was recommended by their Commanding Officers. This is when I was told by an officer at the reserve center that if I continued to pursue questioning the reasons why I was not promoted, I would be Court-Martialed for insubordination. I had decided on a military career and a Court-Martial on my records would have completely destroyed my career.

From the time of my enlistment on 14 December 1945, until I was recalled to active duty in my reserve grade, 7 years and 3 months, I was denied my rightful promotions in my reserve grade because of the prejudices that the promotion authorities practiced against reserve officers who had decided to make a career of the military, and enlisted in the regular service, while maintaining his reserve commission. Reserve officers who remained in a civilian status were promoted when they became eligible and recommended by their commanding officers, under the same regulations that a reserve

officer serving in enlisted status would have been promoted.

When the reserve promotion authorities used the status of being enlisted to deny a reserve officer of his rightful promotion, it amounted to a violation of his civil rights. Further, when a reserve officer was distinguished from, and not treated in a class as other reserve officers and was discriminated against because of his enlisted status, was a gross violation of his constitutional rights.

The Air Force Board, the Federal District Court, or the Court of Appeals, Tenth Circuit, completely ignored the gross injustices that discriminated against me as a reserve officer during the period of 14 December 1945 and 10 March 1953. The same regulations that promoted reserve officers on extended active duty and reserve officers not on extended duty, applied to reserve officers not on extended active duty, applied to reserve officers serving on active duty as enlisted personnel. The regulations

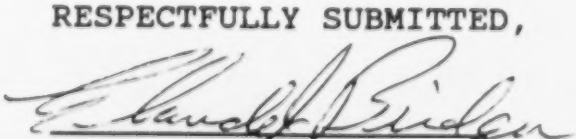
made on distinction between these individuals. The District Court erred when it stated that I was not eligible for promotion. The regulations make one eligible and your commanding officer qualifies one for promotion.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because of the errors and injustices that I was subjected to that discriminated against me as a reserve officer. The Board for Correction of Military Records may, in the interest of justice or to correct errors, no matter how long ago the errors of injustices occurred. The Board for Correction of Military Records, District Court for New Mexico and the U.S. Court of Appeals, Tenth Circuit, have completely disregarded and ignored the errors, injustices and discriminations that were practiced against me and denied my application as untimely filed. When the Board decided to review my application on its merits, filed far beyond the three year limit, it implicitly determined that the

"interest of justice" far out-weighed any governmental prejudices. Further, by voluntarily excusing the untimely filing and processing and reviewing my application, the Board waived any previous right they may have had to deny my application as untimely filed. Kaiser v. Secretary of the Navy, 525 F.Supp. 1226 (D. Colo. 1981). I have further listed in my original application to the Correction Board, numerous court cases that support my contentions of the errors and injustices that discriminated against me as a reserve office. The Board's ruling was arbitrary and capricious, and unsupported by evidence and erroneous in law. Both the District Court and the Appeals Court, Tenth Circuit, abused their discretion not holding that the injustices had occurred and the Board's denial of my application was arbitrary and capricious. This Court should take the opportunity to correct the Board and the Court should grant my request for the Writ of Certiorari.

RESPECTFULLY SUBMITTED,



CLAUDE J. BRIDGES,
Appellant, Pro Se

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CLAUDE J. BRIDGES,

Plaintiff,

FILED: MAY 9, 1991
Robert M. March, Clerk

vs.

THE SECRETARY OF THE AIR FORCE
and THE AIR FORCE BOARD FOR CORRECTION
OF MILITARY RECORDS,

Defendants.

JUDGMENT

This matter is presently before the Court on defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment.

The Court, having read the memoranda submitted by the parties, having examined the exhibits attached thereto and being apprised of the applicable law, FINDS that the Motion for Summary Judgment should be granted. The Court having filed herein its Memorandum Opinion and Order, now, therefore, in conformity with the Memorandum Opinion Order, it is hereby

ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss or, in the Alternative, for Summary Judgment of defendants The Secretary of the Air Force and The Air Force Board for Correction of Military Records should be, and hereby is, GRANTED.

/s/ Santiago E. Campos
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CLAUDE J. BRIDGES,

Plaintiff,

vs.

THE SECRETARY OF THE AIR FORCE and THE AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS,

Defendants.

FILED: MAY 9, 1991
Robert M. March, Clerk

MEMORANDUM OPINION AND ORDER

This case is before the Court on defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment. The Court finds that the Motion to Dismiss is not well taken and will be denied, and that the Motion for Summary Judgment is well taken and will be granted.[1]

I. **LEGAL STANDARDS**

In ruling on a motion to dismiss, the Court must accept the factual allegations of the complaint as true. Jenkins v. McKeithen, 395

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[1]Defendants filed a Motion to Dismiss or, in the Alternative, for Summary Judgment on January 2, 1991. On February 11, 1991, following the filing of Plaintiff's First Amended Complaint, defendants filed a Supplemental Motion to Dismiss or, in the Alternative, for Summary Judgment. The Court will treat these motions together.

U.S. 411, 421, reh'g denied, 396 U.S. 869 (1969); Dewell v.Lawson, 489 F.2d 877, 879 (10th Cir. 1974). Only if, after liberal construction of the pleadings, there appears to be no possibility that the Plaintiff can prove a set of facts which would warrant relief should the motion to dismiss be granted. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Gas-a-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102, 1107 (10th Cir. 1973).

While the Court considers only the claims contained in the complaint in ruling on a motion to dismiss, a motion for summary judgment requires the Court to examine evidence and to grant the motion if no genuine issue of material fact exists, entitled the moving party to judgment as a matter of law. Fed. R. Civ. P. 56; Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The burden of establishing the absence of a material question of fact is on the moving party, which may discharge its duty by showing that there is an absence of evidence to support the non-moving party's case. Celotex Corp v.

Catrett, 477 U.S. 3317 (1986). The non-moving party has the opportunity to show the existence of an issue of material fact; however, the Court must consider the standard of proof in the case and determine whether, considering all facts in favor of the non-moving party, that party's showing would allow a reasonable trier of fact to find for the non-moving party on that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1377 (10th Cir. 1980).

II. **FACTS**

Plaintiff, Claude J. Bridges, was appointed as a Flight Officer in the United States Army on February 17, 1943, and commissioned as a Second Lieutenant in the United States Army Air Corps on August 4, 1944. Upon being released from active duty on December 8, 1945, Bridges was commissioned as a Second Lieutenant in the Army Air Corps Reserves.

On December 14, 1945, as part of a program designed to retain experienced personnel in military service, Bridges enlisted in the Army

Air Corps as a Master Sergeant while retaining his commission in the Army Air Corps Reserves as a Second Lieutenant. Bridges served on active duty as a Master Sergeant for seven years and three months in the Army Air Corps and its successor, the United States Air Force. On March 10, 1953, during the Korean Conflict, Bridges was recalled to active duty in his status as a reserve officer. He maintained the rank of Second Lieutenant. Bridges was honorably discharged from active duty in the grade of captain and retired for length of service as of May 1, 1962. At that time Bridges was credited with twenty years and twenty-eight days of active duty service.

In his Complaint, Bridges alleges that between 1945 and 1953 he was wrongfully denied promotions as a reserve office to which he was entitled pursuant to regulations then in effect. Bridges further alleges that while serving as an enlisted Master Sergeant, before being recalled to duty in 1953, he asked about his failure to be promoted as a reserve office. Bridges was

told that he was ineligible for promotion. When Bridges pursued the inquiring within his chain of command, he was threatened with court martial. As a result of the threat, he did not investigate further.

Bridges claims that he did not become aware that a remedy existed for the failure to properly promote him until 1987 when he learned from a news publication that the Air Force Board for Correction of Military Records ("the Board") could correct such wrongs. Bridges went to the Board and requested that his military personnel records be corrected to recognize promotions which he claims to have been wrongfully denied. Bridges' request was denied on November 27, 1989. On May 31, 1990, the Board also denied Bridges request that the decision be reconsidered. Subsequently, defendant, the Secretary of the Air Force, followed the recommendation of the Board and refused to change Bridges' military personnel records. Bridges filed suit, alleging as follows:

1. The Board addressed Bridges' application for correction on the merits until a final decision was made denying Bridges' requested correction on the procedural basis that the three-year statute of limitations for seeking correction of personnel records had expired. 10 U.S.C. § 1552. Bridges alleges that by addressing the merits of the case, the Board waived any right to raise his failure to file his application within the limitation period.

2. The defendants' actions were "arbitrary, capricious, contrary to law and an abuse of discretion." Complaint at p.3.

Bridges asks the Court to direct defendants to correct the personnel record and to award attorneys' fees as permitted under the Equal Access to Justice Act, 28, U.S.C. § 2412. Alternatively, Bridges requests an award of damages not to exceed $10,000 if the Court finds that he is entitled to mandated compensation for damages sustained pursuant to the Tucker Act.

Bridges asserts that the Tucker Act is inapplicable.[2]

III. **ARGUMENTS**

Defendants argue that Bridges' claims accrued in 1953, the last year during which he contends to have been wrongfully denied a promotion. Citing Brownfield v. United States, 589 F.2d 1035 (Ct. Cl. 1978). Consequently, the six-year statute of limitations governing civil actions against the United States under 28 U.S.C. § 2401 had run when Bridges applied to the Board in 1989. As a result, defendants assert that this case should be dismissed.

Defendants also argue that even if the Court accepts Bridges' contention that the

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[2]In their original Motion to Dismiss or, in the Alternative, for Summary Judgment, filed prior to the filing of Plaintiff's First Amended Complaint, the Defendants argued that this action was founded upon the Tucker Act. Under the Tucker Act, this Court may only maintain jurisdiction if the value of the case is $10,000 or less. 28 U.S.C. § 1346. In addition, in Tucker Act cases, this Court must follow precedent established by the United States Court of Appeals for the Federal Circuit and its predecessor, the United States Court of Claims. See 28 U.S.C. §§ 1295(a)(2) and (3); United States v. Hohri, 482 U.S. 64 (1987).

statute of limitations did not begin to run until the date of the Board's decision not to afford Bridges his requested relief, the Board's decision should still be upheld and summary judgment granted for the defendants on the basis that the decision of the Board not to waive its three-year statute of limitations was not arbitrary and capricious. Citing 10 U.S.C. § 1552(b).

IV. **ANALYSIS**

The Tucker Act provides subject matter jurisdiction to the United States District Court and the United States Claims Court in certain categories of civil cases brought against the United States. 28 U.S.C. §§ 1346(a)(2) and 1491. If the monetary relief sought is greater than $10,000, the Tucker Act vests exclusive jurisdiction in the United States Claims Court. 28 U.S.C. § 1491.

The Court finds that Bridges' action is brought under the Tucker Act. Bridges has explicitly limited his claim for damages to $10,000, thereby properly invoking the

concurrent jurisdiction of this Court. This action is appealable to the United States Court of Appeals for the Federal Circuit and precedent established by the United States Court of Appeals for the Federal Circuit is binding on this Court in this case. 28 U.S.C. §§ 1295(a)(2) and (3); United States v. Hohri, 482 U.S. 64 (1987); Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986).

Under 28 U.S.C. § 2401, there is a six-year statute of limitations governing civil actions brought against the United States. Defendants argue that, pursuant to the applicable precedent, Bridges' claim accrued in 1953, the last year during which he contends to have been wrongfully denied a promotion. Citing Brownfield v. United States, 589 F.2d 1035 (Ct. Cl. 1978). Consequently, the six-year statute of limitations had run when Bridges applied to the Board in 1989, and this case must be dismissed. The Court disagrees with defendants' reading of Brownfield. Brownfield establishes that a claim bought [sic] to contest a decision by a body

such as the Board "first accrues when the government official or agency responsible for determining the plaintiff's rights takes final action that is dispositive of his claim." Id. at 1038. In Brownfield the plaintiff had asserted the same claim before the Board twice, and the court held that the second application to the Board did not extend the plaintiff's time for filing suit in federal court. The court seems to be clearly stating that the statute of limitations did not begin running until after the first decision was rendered by the Board. Id. at 1039. Contrary to the arguments of defendants, the holding in Brownfield is consistent with the Tenth Circuit's holding in Smith v. Marsh, 787 F.2d 510, 511-12 (10th Cir. 1986), in which the court held that the statute of limitations in an action challenging agency action does not begin to run until the

administrative body acts.[3]

Bridges had six years from the time that the Board denied his application to file suit in this Court challenging the Board's actions. Accordingly, this action is not barred by the expiration of the statute of limitations.

Summary Judgment, however, is warranted. There has not been even a scintilla of evidence presented to the Court to support the proposition that the actions of the Board were arbitrary or capricious. Anderson v. Liberty Lobby, 477 U.S. at 252. Bridges admits that he suspected that the Army improperly failed to promote him prior to being recalled to duty as an officer in the Korean Conflict. He further concedes that he ceased his efforts to remedy the suspected error after being threatened with court martial and did not inquire further until 1987.

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[3]For purposes of establishing whether a suit is time barred, a lawsuit contesting the actions of the Board is different than one contesting the initial failure to promote. See, e.g., Smith v. Marsh, 787 F.2d 510, 511 (10th Cir. 1986).

The Board declined to consider Bridges' application stating as follows:

> 1. The application was not filed within three years after the alleged error or injustice was discovered, or reasonably could have been discovered, as required by 10 U.S.C. 1552 and Air Force Regulation 31-3. Although the applicant asserts a date of discovery which would, if correct, make the application timely, the essential facts which gave rise to the application were known to Applicant long before the asserted date of discovery. Knowledge of those facts constituted the date of discovery and the beginning of the three year period for filing. Thus the application is untimely.
>
> 2. 10 U.S.C. 1552(b) permits us, in our discretion, to excuse untimely filing in the interest of justice. We have carefully reviewed applicant's submission and the entire record, and we do not find a sufficient basis to excuse the untimely filing of this application. The applicant has not shown a plausible reason for delay in filing, and we are not persuaded that the record raises issues of error in injustice which required resolution on the merits at this time. Accordingly, we conclude that it would not be in the interest of justice to excuse the untimely filing of this application.

Administrative Record at p.23. The findings of the Board were neither arbitrary nor capricious. Bridges simply failed to act within the

statutorily established statute of limitations. As a result, the Board found that his application was time barred. Furthermore, the actions of the Board did not constitute a waiver of the statute of limitations issue. The Board did not reach the merits of the case, but decided it based on the procedural basis of Bridges' failure to seek correction in a timely fashion. Accordingly, the Court grants summary judgment for the defendants.

THEREFORE, IT IS ORDERED that the Motion to Dismiss of defendants, the Secretary of the Air Force and the Air Force Board for Correction of Military Records, should be, and hereby is, **DENIED.**

IT IS FURTHER ORDERED that the Motion for Summary Judgment of defendants, the Secretary of the Air Force and the Air Force Board for Correction of Military Records, should be, and hereby is, **GRANTED.**

/s/ Santiago E. Campos
UNITED STATES DISTRICT COURT

APPENDIX A (1)

FILED: February 7, 1992
Robert L. Hoecker, Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CLAUDE J. BRIDGES Plaintiff-Appellant, vs. THE SECRETARY OF THE AIR FORCE; THE AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS, Defendants-Appellees.	)	No. 91-2161 (D.C. No. 90-1048-SC) (D.N.M.)

ORDER AND JUDGMENT*

Before **MOORE**, **TACHA**, and **BRORBY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

therefore ordered submitted without oral argument.

Plaintiff-appellant Claude J. Bridges appeals the district court's order granting summary judgment on behalf of Defendants, the Secretary of the Air Force and the Air Force Board for the Correction of Military Records (the Board). On appeal, Bridges argues that the district court erred by entering summary judgment prior to discovery and by holding that the Board had not waived the 10 U.S.C. § 1552 time limitation. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

Bridges alleges that in 1987 he requested that the Board correct his military personnel records to recognize promotions that were wrongfully denied him between 1945 and 1953. The Board denied his request on November 27, 1989 and denied his request for reconsideration on May 31, 1990. On October 30, 1990, Bridges filed suit against Defendants, alleged that the Board had waived any right to raise the three-

year time limitation of 10 U.S.C. § 1552 by addressing the merits of the case, asked the district court to direct Defendants to correct his record, and requested attorneys' fees. The district court granted Defendants' motion for summary judgment, held that the Board's findings -- that Bridges' application for correction of his military records was untimely -- were not arbitrary and capricious, and held that the Board did not waive the three-year time limitation contained in 10 U.S.C. § 1552.

We first address the issue of this court's jurisdiction. Bridges claims that federal jurisdiction in this case is pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702, in which case this court has appellate jurisdiction under 28 U.S.C. 1291, and not pursuant in whole or in part to 28 U.S.C. § 1346(a)(2), in which case exclusive appellate jurisdiction would vest in the United States Court of Appeals for the Federal Circuit under 28 U.S.C. § 1295(a)(2). For jurisdiction in the district court to arise

under 28 U.S.C. § 1346(a)(2) -- known as the Little Tucker Act -- a plaintiff must assert a claim seeking money not exceeding $10,000 from the United States, and that claim must be founded either upon a contract or upon the Constitution or a federal statute that grants a substantive right to compensation by the federal government. Van Drasek v. Lehman, 762 F.2d 1065 (D.C. Cir. 1985). Bridges contends that jurisdiction under § 1346(a)(2) is not appropriate because of resolution of this case in his favor would not result in monetary damages, but only in a reversal of the Board's determination that his claim is time barred by 10 U.S.C. § 1552. The Board has only considered the § 1552 time limitation issue and would not consider the merits of his corrections request -- which potentially could result in monetary damages -- until after a decision in Bridges' favor. Because a decision in Bridges' favor in this case at most would entitle Bridges to have the merits of his corrections request considered

by the Board, he has not asserted a claim based on a statute that provides a substantive right to compensation at this stage of the case. See Guercio v. Brody, 884 F.2d 1372 (Fed. Cir. 1989) (jurisdiction under Little Tucker Act is appropriate only if plaintiff identifies a substantive statutory provision entitling her to money damages). Therefore, we hold that federal court jurisdiction arose in this case under 28 U.S.C. § 1331 and 5 U.S.C. § 702; consequently, this court has jurisdiction under 28 U.S.C. § 1291.

Bridges also contends that the district court erred by granting summary judgment in favor of Defendants before he had an adequate opportunity to complete discovery. Bridges included with his Response a Rule 56(f) affidavit which stated that he needed to discovery the relevant regulations and policies -- some of which were only contained in Washington, D.C. offices -- in order to make his case that the Board had acted in an arbitrary

and capricious manner. Despite Bridges' requests for additional discovery, the district court granted Defendants' motion for summary judgment. We review a district court's decision whether to grant additional time for discovery under an abuse of discretion standard. See Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1514 (10th Cir. 1990); United States v. Little Al, 712 F.2d 133, 135 (5th Cir. 1983).

The Board's decision to deny Bridges' application as untimely is based on 10 U.S.C. § 1552(b):

> No correction may be made . . . unless the claimant . . . files a request for the correction within three years after he discovers the error or injustice. However, [the] board . . . may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

Section 865.9(b) of title 32 of the Code of Federal Regulations provides the Board with additional guidance on when it may deny an application for correction as untimely:

> The Board may deny an application if it determines that . . . the

> applicant did not file his or her application within 3 years after he or she discovered or reasonably could have discovered the alleged error in injustice and insufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file within the prescribed 3 years.

(Emphasis added.) In its Findings and Conclusions, the Board stated that "the applicant has not shown a plausible reason for delay in filing." Likewise, in its order granting defendants' motion for summary judgment, the district court stated that "[t]here has not been even a scintilla of evidence presented to the Court to support the proposition that the actions of the Board were arbitrary or capricious." After carefully reviewing the Board's order, the district court continued, "The findings of the Board were neither arbitrary nor capricious. Bridges simply failed to act within the statutorily established statute of limitations."

On appeal, Bridges argues that the Board waived the three-year time limit for filing

applications because it addressed the merits of his claim. After reviewing the Findings, Conclusions, and Decision of the Board, we conclude that Bridges' argument is meritless because the Board addressed only the timeliness of his application.

Accordingly, we **REVERSE** the district court with respect to the jurisdiction basis of this case, take jurisdiction under 28 U.S.C. § 1291, and **AFFIRM** the district court in all other respects. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

APPENDIX B

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

CIRCULAR)
No. 310) WAR DEPARTMENT
WASHINGTON 25, D.C., 6 October 1945

Effective until 6 April 1947 unless sooner rescinded or superseded

ENLISTMENTS AND REENLISTMENTS IN THE REGULAR ARMY

	Section
GENERAL	I
APPOINTMENT AND DUTIES OF POST, AND UNIT RECRUITING OFFICERS	II
PERIODS OF ENLISTMENT	III
QUALIFICATIONS FOR ENLISTMENT	IV
GRADE IN WHICH ENLISTED; PROMOTION FROM SEVENTH TO SIXTH GRADE	V
PROCEDURE	VI
FINANCIAL ASPECTS	VII
RETIREMENT	VIII
REENLISTMENT FURLOUGHS	IX
FREE MAIL; VETERANS' BENEFITS	X
NOTIFICATION	XI
RESCISSIONS	XII

I. **GENERAL.** 1. The purpose of this circular is to prescribe procedures to be followed in accepting enlistments and reenlistments in the Regular Army, pursuant to the Act of 1 June 1945 (Public Law 72--79th Congress), as amended by the Armed Forces Voluntary Recruitment Act of 1945 (Act of 6 October 1945).

2. a. Except as indicated in paragraphs 7, 8, and 9, every enlisted man who is serving honorably and faithfully and who has to enlisted or reenlisted in the Regular Army since 1 June

6, 7, and 8, will be accepted only in cases specifically authorized by The Adjutant General.

V. GRADE IN WHICH ENLISTED; PROMOTION FROM SEVENTH TO SIXTH GRADE. 10. a. Men enlisted prior to 1 February 1946 will be enlisted in the grades specified below:

(1) Men honorably discharged and enlisted within 20 days after the date of discharge, will be enlisted in the grade held at the time of such discharge, permanent or temporary, whichever is higher.

(2) Men honorably discharged on or after 12 May 1945, and before 1 November 1945, will be enlisted in the grade held at the time of discharge, permanent or temporary, whichever is higher, provided enlistment is effected prior to 21 November 1945.

(3) Men enlisted in the categories described in a (1) and (2) above will be given the same date of rank as that held at time of discharge. Pending revision of TM 12-230, appropriate entry will be made in the new service record under "Remarks-Administrative" to indicate date of rank.

(4) Men honorably discharged from the grade of private, who have had active service in the Army of at least 6 months, and who enlist within 20 days after the date of discharge, will be enlisted in grade six (private first class).

(5) Men honorably discharged from the grade of private on or after 12 May 1945, and before 1 November 1945, who have had active service in the Army of at least 6 months, will be enlisted in grade six (private first class),

provided enlistment is effected prior to 21 November 1945.

(6) Men who have enlisted or reenlisted in the Regular Army on or after 1 June 1945, in grades which do not correspond to the provisions of (1), (2), (3), (4), and (5) above will be promoted accordingly and appropriate notations will be entered in their service records.

(7) All other applicants, except as indicated in b or c below will be enlisted in the grade of private.

b. Applicants for enlistment, whose last period of active service in the Army of the United States was in the status of commissioned officer, warrant officer, or flight officer, will be enlisted in the first grade, provided such enlistment is effected within 20 days of the date of release from such active service.**

c. The provisions of this paragraph do not preclude the statutory right to reenlist in grade of former Regular Army enlisted men who were discharged to enter upon active duty as

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**War Dept. Memo - 8 Nov 1945, reserve officers enlisting under sect V par b in the first grade are not required to resign their reserve commissions they will be serving in the duel status and maintain their reserve commissions. Edward F. Witsell, Major Gen. The Adjutant General.

interview, will enter in the service record under "Remarks--Administrative" a notation "Provisions of WD Circular 310, 1945, explained to EM." This notation will be signed by the enlisted man.

c. The provisions of this circular will be read and explained by a commissioned officer to all other enlisted men.

XII. RESCISSIONS. 28. Pending the printing of changes in AR 600-750, 30 September 1942, paragraph 5a of those regulations is rescinded.

29. WD Circular 249, 1945; section IV, WD Circular 259, 1945; section X, WD Circular 277, 1945; section III, WD Circular 259, 1945; section II, WD Circular 304, 1945, are rescinded.

(AG 342.06 (5 Oct 45))

BY ORDER OF THE SECRETARY OF WAR:

OFFICIAL:

EDWARD F. WITSELL
Major General
Acting The Adjutant General

G. C. MARSHALL
Chief of Staff

APPENDIX C

CIRCULAR)
No. 10) WAR DEPARTMENT
WASHINGTON 25, D.C., 11 January 1946

Effective until 11 July 1947 unless sooner rescinded or superseded.

PROMOTION OF OFFICERS ON RELIEF FROM ACTIVE DUTY

1. GENERAL. a. The following instructions supplement TWX messages, TAGO, SPXPO-P, AG 210.2, 31 October 1945 and 13 December 1945, and when in conflict with interpretations of directives contained in those messages, the instructions published herein govern.

b. Promotions discussed herein apply only in the cases of officers below the grade of colonel, and not members of the Regular Army, coincident with processing for separation from active duty. Current instructions regarding promotions of officers remaining on active duty are not affected by this directive.

2. OFFICERS WHO HAVE NOT BEEN PROMOTED WHILE ON ACTIVE DUTY. a. Any officer who has had active service of more than 2 years subsequent to 16 September 1940, and who has an efficiency index of 35 or more, and who has not

been promoted coincident with his relief from active duty.

b. An officer who entered on active duty while holding a certificate of capacity for a higher grade, and who is subsequently promoted in the Officers' Reserve Corps, is considered as having been promoted after entry on active duty and is not eligible for further promotion under this paragraph.-

3. OFFICERS WITH SPECIFIED PERIODS IN GRADE. Officers who have served time-in-grade as specified below and have attained a minimum efficiency index of 40 are eligible for one-grade promotion, coincident with relief from active duty --

a. As 2d or 1st lieutenant, for promotion to 1st lieutenant or captain --- 18 months.

b. As captain or major, for promotion to major or lieutenant colonel --- 24 months.

c. As lieutenant colonel, for promotion to colonel --- 30 months. In computing length of service, add 50 percent for service oversees.

Women's Army Corps who were promoted from 3d officer to 2d officer in the original Women's Army Auxiliary Corps, are considered as having received promotion while on active duty.

12. EFFECT OF RECLASSIFICATION OR DEMOTION. a. Officers whose separation is caused by reclassification procedures, or by action to avoid such procedures, are ineligible for promotion under this authority.

b. An officer promoted since entry on active duty, and subsequently demoted, is not eligible for promotion under paragraph 2 (TWX 31 Oct 1945), but may qualify for promotion under paragraph 3 (TWX 13 Dec 1945).

13. PROMOTIONS IN AUS-AC. Officers originally promoted to a certain grade in AUS (Air Corps) (Public Law 455--77th Cong.; sec. I, WD Bul. 8, 1942) and subsequently promoted to the same grade in the Army of the United States will use the earlier date of rank as the beginning of the prescribed period of service.

BY ORDER OF THE SECRETARY OF WAR:

OFFICIAL:
EDWARD F. WITSELL
Major General
Acting The Adjutant General

DWIGHT D. EISENHOWER
Chief of Staff